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**Permanent Forum on Indigenous Issues**
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**Follow-up to the recommendations of the Permanent Forum**

# Study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law**

**Note by the Secretariat**

*Summary*

Pursuant to the decision of the Permanent Forum on Indigenous Issues at its fourteenth session, the Permanent Forum appointed Edward John and Dalee Sambo Dorough, members of the Forum, to conduct a study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on Indigenous Peoples and other international human rights law (see E/2015/43-E/C.19/2015/10, para. 45). The outcome and recommendations of the study are hereby submitted to the Permanent Forum at its fifteenth session.

* E/C.19/2016/1.

** An expanded version of the present study is available as a conference room paper of the Permanent Forum on Indigenous Issues.

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# I. Introduction

1. The Permanent Forum on Indigenous Issues continues to examine various effects of State actions in intergovernmental processes since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (United Nations Declaration) by the General Assembly in its resolution 61/295 on 13 September 2007. Indigenous peoples fought hard to achieve the human rights standards in the United Nations Declaration and remain proactive to ensure maximum compliance in their implementation. Pursuant to its articles 38, 41 and 42, States, the United Nations and its organs, bodies and specialized agencies are required to respect and fully apply the United Nations Declaration and take appropriate measures to achieve, not devalue, its ends.

2. Regressive actions have been observed in such international organizations and processes as the United Nations Framework Convention on Climate Change, the Convention on Biological Diversity, the Food and Agriculture Organization of the United Nations (FAO), the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Bank. Within those forums, there is an alarming trend in the behaviour of States to diminish the standards in the United Nations Declaration, including actions to devalue indigenous peoples' status, rights and participation. Rather, States must uphold their responsibilities and uplift the status, rights and participation of indigenous peoples.

3. The present study examines the matter and concludes that those actions are inconsistent with the purposes and principles of the Charter of the United Nations, as well as the rights and obligations affirmed in the United Nations Declaration and other international human rights law.

4. The preamble of the United Nations Declaration invokes the Charter and reiterates the need for States to act in "good faith in the fulfilment of the obligations assumed by States in accordance with the Charter". The preamble recognizes the "urgent need to respect and promote the inherent rights of indigenous peoples" and that such recognition "will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith". Those are responsibilities that States have assumed with the adoption of, and reiteration of support for, human rights standards and have now been recognized as a key measure of State compliance by treaty bodies, special rapporteurs and other independent experts.

5. The United Nations Declaration is a principled framework for justice, reconciliation and healing. The Office of Legal Affairs, at the request of the then Commission on Human Rights, has indicated that "in United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected" (see E/3616/Rev.1, para. 105). The former Special Rapporteur on the rights of indigenous peoples, James Anaya, emphasized that "even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law" (see A/65/264, para. 62). In addition, James Crawford has underlined that "even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law and, if substantially

unanimous, for the speedy consolidation of customary rules. Examples of important 'law-making' resolutions include ... the United Nations Declaration on the Rights of Indigenous Peoples".[1]

6. In the United Nations Declaration, there are diverse provisions that reflect State obligations in both conventional and customary international law. For example, the International Law Association has indicated in its expert commentary that "the relevant areas of indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination; autonomy or self-government; cultural rights and identity; land rights as well as reparation, redress and remedies".[2]

## II. International organizations and States: obligations relating to human rights law

7. In the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, it is recognized that "the rule of law applies to all States equally, and to international organizations ... and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions" (see resolution 67/1, para. 2).

8. The obligations of international organizations include, inter alia, those arising from customary international law and peremptory norms. For example, the prohibition against racial discrimination is a peremptory norm or jus cogens and States and international organizations are bound to respect that norm (see A/56/10, p. 208, para. (5)). Where discriminatory provisions in any international agreement were adopted, such texts lacked validity. In regard to indigenous peoples, interpretations would need to be adopted that do not discriminate against them, or else the offending provisions would require amendment. Otherwise, the superior human rights norms would prevail.

9. In an Advisory Opinion in 1980, the International Court of Justice emphasized: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[3] Whether through joint or separate action, States parties cannot evade their international human rights obligations by acting through international organizations. According to Article 103 of the Charter, in the event of conflict between the obligations of States under the Charter and those under any other international agreement, the Charter obligations would prevail.

10. International organizations cannot use consensus to devalue indigenous peoples' human rights, including the United Nations Declaration and other international human rights instruments. As underlined in the August 2011 report of

[1] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), p. 42.

[2] International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference, 2010.

[3] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, para. 37.

the Expert Mechanism on the Rights of Indigenous peoples: "Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples. Where beneficial or necessary, alternative negotiation frameworks should be considered, consistent with States' obligations in the Charter of the United Nations and other international human rights law" (see A/HRC/18/42, annex).

11. Participation in international forums is challenging for indigenous peoples, since the rules are heavily weighted in favour of States. Indigenous peoples remain highly vulnerable to State discretion as they are not part of any consensus.[4] With virtually no checks and balances within outdated procedural rules, States may propose and agree to discriminatory or substandard provisions.

12. In international organizations, States have a tendency to excessively reinforce their own sovereignty in addressing both substantive and procedural issues. Serious shortcomings in the procedural rules of such organizations continue to severely affect indigenous peoples' participation and their substantive rights. Indigenous self-determination is especially undermined.

13. The procedures within international organizations require urgent redress. Indigenous rights and concerns relating to such crucial global issues as biodiversity,[5] food security,[6] climate change,[7] development,[8] free trade[9] and intellectual property,[10] are being addressed in a manner detrimental to indigenous peoples.[11]

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[4] "Consensus", as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

[5] See, e.g., Grand Council of the Crees (Eeyou Istchee) and others, "Nagoya protocol on access and benefit sharing: substantive and procedural injustices relating to indigenous peoples' human rights", Expert Mechanism on the Rights of Indigenous Peoples, fourth session, Geneva, July 2011.

[6] Grand Council of the Crees (Eeyou Istchee) and others, "FAO Voluntary Guidelines on Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: discrimination and subjugation of indigenous peoples and rights". Available from http://quakerservice.ca/wp-content/uploads/2012/05/FAO-Natl-Food-Security-Guidelines-Governance-of-Indigenous-Tenure-Rights-GCCEI-Joint-Submission-Apr-12.pdf.

[7] See, e.g., International Indigenous Peoples' Forum on Climate Change, "Indigenous groups announce grave concern on possible Cancun outcome", press release, 10 December 2010.

[8] "Statement of Special Rapporteur to UN General Assembly, 2011", New York, 17 October 2011. Available from http://unsr.jamesanaya.org/statements/statement-of-special-rapporteur-to-un-general-assembly-2011.

[9] See A/HRC/10/5/Add.2, para. 33: "The human rights obligations of [World Trade Organization] WTO members and the commitments they make through the conclusion of agreements under the WTO framework remain uncoordinated ... trade negotiators either are not aware of the human rights obligations of the Governments they represent, *or they do not identify the implications for their position in trade negotiations*." (emphasis added)

[10] World Intellectual Property Organization (WIPO) (Traditional Knowledge Division), "Note on existing mechanisms for participation of observers in the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: comments submitted by the Grand Council of the Crees (Eeyou Istchee)", 30 November 2011.

[11] See also Forest Peoples Programme, "FPP E-Newsletter", April 2012: "The continuous, sometimes subtle, violence of conservation and development against indigenous peoples continues, unchecked even at the highest levels by the most worthy-sounding agencies of the United Nations." Available from http://www.forestpeoples.org/topics/environmental-governance/publication/2012/fpp-e-newsletter-april-2012-pdf-version.

14. Strong procedural rules are necessary to prevent States from using consensus on substandard proposals that are inconsistent with the principles of justice, democracy, non-discrimination, respect for human rights and rule of law. Effective compliance mechanisms would be required. Even where a consensus "rule" exists, the Secretary-General has described consensus as a "privilege ... [and] that this privilege comes with responsibility".[12] Concerns relating to consensus have also surfaced at the General Assembly:

> But unfortunately, consensus ... has become an end in itself ... This has not proved an effective way of reconciling the interests of Member States. Rather, it prompts the Assembly to retreat into generalities, abandoning any serious effort to take action. Such real debates as there are tend to focus on process rather than substance and many so-called decisions simply reflect the lowest common denominator of widely different opinions (see A/59/2005, para. 159).

## III. Actions within international organizations to devalue indigenous human rights

### United Nations Framework Convention on Climate Change

15. The United Nations Framework Convention on Climate Change employs strict rules of procedure to ensure a "party-driven process". Such a process severely limits opportunities for interaction between parties and indigenous peoples. Indigenous peoples face marginalization in the negotiations of multilateral environmental instruments. Those procedural injustices directly translate into substantive injustices. Representatives of indigenous peoples typically attend multilateral environmental negotiations as observers. Generally, observers do not have the right to speak during formal negotiations and may not even have the right to be in the room where formal negotiations are being conducted.

16. In December 2015, at the Paris climate change negotiations, the methods used by the Conference of the Parties to the United Nations Framework Convention on Climate Change permitted extremely limited opportunities for indigenous peoples to engage in text-based negotiations. The negotiations were conceptual, rather than text-based. After one or more rounds of conceptual negotiations, facilitators worked to produce compromise texts. At the Convention, the final stages were party to party and did not necessarily even occur in negotiating rooms.

17. On an issue as complex as the rights of indigenous peoples, a "conceptual" negotiation proved to generate confusion. Some parties expressed concern regarding the use of the term "peoples", and with the concept of collective human rights. That led several parties to suggest that human rights language should not include references to the rights of indigenous peoples. Parties then attempted to negotiate human rights text, when, by their own admission, many of the negotiators lacked any meaningful knowledge on international human rights law.

[12] Department of Public Information, "Secretary-General calls on delegates to end stagnation in disarmament conference, seize 'Collective opportunity to build a safer world', at Headquarters meeting", New York, 24 September 2010. Available from http://www.un.org/press/en/2010/sgsm13138.doc.htm.

18. The Office of the United Nations High Commissioner for Human Rights (OHCHR) concluded: "It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights. Climate change has profound impacts on a wide variety of human rights, including the rights to life, self-determination, development, food, health, water and sanitation and housing." OHCHR further added, "climate change is a human rights problem and the human rights framework must be part of the solution".[13] However, the Paris Agreement, adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its twenty-first session on 12 December 2015, provides only one reference to "human rights" in the whole text. Part of the preamble provides:

> *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity[.]

19. It is inaccurate to suggest: "Parties *should* ... respect, promote and *consider* their respective obligations on human rights." State obligations on human rights are not discretionary. In international law, States have an obligation to respect, protect, promote and fulfil human rights. In June 2007, the Human Rights Council affirmed by consensus that the "promotion and protection of all human rights" permanently includes the "rights of peoples, and specific groups and individuals" (see A/62/53, chap. IV, sect. A). For more than 35 years, there has been the practice of addressing indigenous peoples' collective rights within the international human rights system. To deny indigenous peoples' collective human rights would constitute forced assimilation and racial discrimination.

20. In his August 2012 report to the General Assembly, former Special Rapporteur James Anaya indicated: "Being among those most affected by climate change, indigenous peoples have for years been demanding greater protection of their human rights in the context of international discussions on climate change and for their effective participation in those discussions, in accordance with the principles of the Declaration on the Rights of Indigenous Peoples." Anaya further added, "The outcomes of these processes should reinforce the rights of indigenous peoples as affirmed in the Declaration. In no instance should a new international treaty or other instrument, or the outcome document of a conference, fall below or undermine the standards set forth in the Declaration or established in other international sources" (see A/67/301, paras. 62 and 91).

[13] See Office of the United Nations High Commissioner for Human Rights (OHCHR), "Understanding human rights and climate change: submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change", 26 November 2015, p. 6.

**Convention on Biological Diversity**

*Undermining indigenous peoples' status*

21. In November 2015, the Ad Hoc Open-ended Inter-sessional Working Group on Article 8 (j) and related provisions considered the "Draft voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the [free,] prior informed consent [or approval and involvement] of indigenous peoples and local communities for accessing their knowledge, innovations and practices, the fair and equitable sharing of benefits arising from the use and application of such knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge".[14]

22. The Working Group then adopted recommendation 9/1 requesting the Conference of the Parties to adopt the voluntary guidelines at its thirteenth meeting in Cancun, Mexico, from 4 to 17 December 2016. Paragraph 3 of the voluntary guidelines provides: "Nothing in these guidelines should be construed as changing the rights or obligations of Parties under the Convention or under the Nagoya Protocol [on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity]." That latter statement could imply that the rights or obligations of parties, as they relate to indigenous peoples, are frozen. That is, in relation to indigenous peoples, the guidelines could not be interpreted in the future in a manner consistent with the progressive development of international law.

23. In October 2014, the Conference of the Parties adopted decision XII/12 F,[15] agreeing to use the terminology "indigenous peoples and local communities", instead of "indigenous and local communities", in future decisions and secondary documents under the Convention on Biological Diversity. While the decision refers solely to the Convention, the decisions and obligations of the parties and amendment procedures in the treaty also relate to all its Protocols. At the same time, the decision added a number of caveats:

> "(a) That the use of the terminology 'indigenous peoples and local communities' in any future decisions and secondary documents shall not affect in any way the legal meaning of Article 8(j) and related provisions of the Convention;
>
> "(b) That the use of the terminology 'indigenous peoples and local communities' may not be interpreted as implying for any Party a change in rights or obligations under the Convention;
>
> "(c) That the use of the terminology 'indigenous peoples and local communities' in future decisions and secondary documents shall not constitute a context for the purpose of interpretation of the Convention on Biological Diversity as provided for in article 31, paragraph 2, of the Vienna Convention on the Law of Treaties or a subsequent agreement or subsequent practice among Parties to the Convention on Biological Diversity as provided for in article 31, paragraph 3 (a) and (b) or special meaning as provided for in article 31, paragraph 4, of the Vienna Convention on the Law of Treaties."

[14] Convention on Biological Diversity, UNEP/CBD/WG8J/REC/9/1.
[15] Ibid., UNEP/CBD/COP/DEC/XII/12.

24. The effect of that was to freeze the interpretation of the term "indigenous peoples and local communities" in future decisions and secondary documents so as to have no legal effect on the Convention on Biological Diversity or on the Nagoya Protocol either now or in the future. Article 22, paragraph 1, of the Convention on Biological Diversity makes it clear that the Convention does not affect States parties' obligations deriving from "existing international agreements". Such agreements clearly include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which include an identical article 1 on the right of all peoples to self-determination.

25. United Nations treaty bodies have confirmed repeatedly that the right of self-determination, as provided in the international human rights Covenants, applies to the world's "indigenous peoples".[16] States that seek to restrict or deny indigenous peoples' status as "peoples" in order to impair or deny their rights are violating the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.[17]

26. It would be manifestly unreasonable to conclude that, under the Convention on Biological Diversity and the Nagoya Protocol, use of the term "indigenous peoples" would have no legal significance. It is well established that, in a wide range of international instruments that use the same term and often address similar subject matters, the status of indigenous peoples had and continues to have a different meaning with legal effects.

27. Examples that use the term "indigenous peoples" without qualification include the Convention for the Safeguarding of the Intangible Cultural Heritage, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the United Nations Declaration on the Rights of Indigenous Peoples, the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want", and the 2005 World Summit Outcome. The same term is also used in the outcome document of the World Conference on Indigenous Peoples and in the Paris Agreement.

*Unjust treatment of the United Nations Declaration on the Rights of Indigenous Peoples*

28. In its preamble, the Nagoya Protocol makes specific reference to the United Nations Declaration on the Rights of Indigenous Peoples. The International Court of Justice has affirmed the value of preambles in interpreting conventions,[18] as does article 31, paragraph 2 of the Vienna Convention on the Law of Treaties. In regard

[16] See, e.g., CCPR/C/CAN/CO/5, paras. 8 and 9; CCPR/C/PAN/CO/3, para. 21; CCPR/C/79/Add.112, para. 17; E/C.12/MAR/CO/3, para. 35; and E/C.12/1/Add.94, para. 11.

[17] In regard to the Covenant, see general comment No. 18, para. 7, of the Human Rights Committee: "The term 'discrimination' as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race*, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons*, on an equal footing, of all rights and freedoms." (emphasis added)

[18] See, e.g., *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950*, p. 266, and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, para. 64.

to the matters in decision XII/12 F, the Executive Secretary of the Convention on Biological Diversity sought informal advice from the Office of Legal Affairs. Yet no mention was made by the Executive Secretary of the Nagoya Protocol and the inclusion in its preamble of the United Nations Declaration.

29. As discussed above, decision XII/12 F could not validly conclude that the term "indigenous peoples", when used in "future decisions and secondary documents", has no legal effect on the Convention on Biological Diversity and the Nagoya Protocol. Decisions XII/12 A and XII/12 B[15] confirm the relevance of the United Nations Declaration in implementing articles 8 (j) and 10 (c), respectively, of the Convention on Biological Diversity.

30. When decisions XII/12 A and XII/12 B highlighted the significance of the United Nations Declaration, Canada refused to join the consensus unless the footnotes referencing the Declaration also "note[d] reservations put forward by Parties". It is inappropriate for the parties at the Conference of the Parties to have added "reservations" in any Conference decision. First, a "reservation" is solely made in regard to treaties, according to the Vienna Convention on the Law of Treaties,[19] and the Declaration only included explanations of vote. Second, according to article 37 of the Convention on Biological Diversity and article 34 of the Nagoya Protocol, no reservations may be made to the Convention or Protocol, except in accordance with articles 29 and 30 of the Convention.

31. Since 2007, the four States that voted against the United Nations Declaration have all formally reversed their positions. Other States have since endorsed the Declaration.[20] It would be misleading for the Convention on Biological Diversity to raise explanations of vote made in 2007 by States who have since changed their position. In any event, explanations of vote do not alter the status of the United Nations Declaration as a consensus instrument.

**World Heritage Convention**

32. The Permanent Forum on Indigenous Issues has received numerous communications from indigenous organizations regarding violations of indigenous peoples' rights in processes of the Convention concerning the Protection of the World Cultural and Natural Heritage. Existing participation procedures are not in accordance with international standards related to the right of indigenous peoples to participate in decision-making in matters that would affect their rights. There is no effective way for indigenous peoples to bring concerns regarding World Heritage sites directly to the attention of the World Heritage Committee.[21]

33. The African Commission on Human and Peoples' Rights in 2011 adopted a specific resolution in which it notes with concern that "there are numerous World Heritage sites in Africa that have been inscribed without the free, prior and

[19] The Rules of Procedure of the General Assembly (A/520/Rev.17) include no express provisions relating to reservations.

[20] Colombia, Samoa and Ukraine had abstained in the 2007 vote in the General Assembly and subsequently endorsed the United Nations Declaration on the Rights of Indigenous Peoples.

[21] International Work Group for Indigenous Affairs and others, "Joint submission on the lack of implementation of the UN Declaration on the Rights of Indigenous Peoples in the context of UNESCO's World Heritage Convention", Permanent Forum on Indigenous Issues, Eleventh Session, 7-18 May 2012. Available from http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/joint-submission-unpfii.pdf.

informed consent of the indigenous peoples in whose territories they are located and whose management frameworks are not consistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples".[22]

34. The African Commission resolution highlighted the 2011 inscription by the World Heritage Committee of Lake Bogoria National Reserve (Kenya) on the World Heritage List without involving the Endorois people in the decision-making process and without obtaining their free, prior and informed consent, emphasizing that this constituted a violation of the Endorois' right to development under article 22 of the African Charter on Human and Peoples' Rights and contravened its 2009 decision in the Endorois case.[23]

35. In paragraph 2 of its resolution, the African Commission urged the World Heritage Committee and UNESCO, "to review and revise current procedures and [the] Operational Guidelines ... in order to ensure that the implementation of the World Heritage Convention is consistent with the United Nations Declaration on the Rights of Indigenous Peoples and that indigenous peoples' rights, and human rights generally, are respected, protected and fulfilled in World Heritage areas" and in paragraph 3 it urged the Committee and UNESCO to "consider establishing an appropriate mechanism through which indigenous peoples can provide advice to the World Heritage Committee and effectively participate in its decision-making processes". The Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the rights of indigenous peoples have all made similar recommendations.[24]

36. As a result, the World Heritage Committee in 2015 added a provision related to the participation of indigenous peoples in the nomination of World Heritage sites to its Operational Guidelines. The Guidelines now encourage States "to demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained through, inter alia, making the nominations publicly available in appropriate languages and public consultations and hearings". However, obtaining indigenous consent is still not a mandatory requirement, and the extent to which indigenous peoples are involved in nomination processes remains at the discretion of the relevant States.

37. The same concern applies to the management of already inscribed sites. The 2015 discussions within the World Heritage Committee revealed strong resistance by many States to adopting real procedural safeguards for the rights of indigenous peoples. Several States even contested the concept of "indigenous peoples", including some States that endorsed the United Nations Declaration, such as France

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[22] *Resolution on the protection of indigenous peoples' rights in the context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage site* (No. 197), 5 November 2011, preamble.

[23] Decision on Communication 276/2003: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya. Available from http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf. The decision affirms the rights of ownership of the Endorois to their ancestral lands around Lake Bogoria and calls on Kenya, inter alia, to "recognise rights of ownership to the Endorois and restitute Endorois ancestral land".

[24] See, e.g., E/2011/43, paras. 40-42; E/2013/43, para. 23; A/HRC/21/52, sect. II.D, proposal 9; A/HRC/30/53, annex; A/67/301, paras. 33-42; and A/HRC/25/74, p. 127. See also International Law Association, "Rights of Indigenous Peoples", Final Report, Sofia Conference, 2012, pp. 17-19.

and Senegal. The Committee also explicitly rejected a proposal to make World Heritage nomination documents publically accessible once they are received by UNESCO. Unless a given State publishes the nomination documents voluntarily, they are only accessible to the members of the Committee, not to affected indigenous peoples or the public.[25]

38. The World Heritage Committee has indicated that it will re-examine issues related to indigenous participation following the adoption of the UNESCO Policy on Indigenous Peoples.[26] Once adopted, the policy is supposed to provide "guidance to staff and committees in order to effectively implement the [United Nations Declaration] in all components of UNESCO's work".[27] However, very little progress on the development and adoption of the policy has been made. The Expert Mechanism on the Rights of Indigenous Peoples has therefore called on UNESCO to strengthen its efforts to finalize the policy, in cooperation with indigenous peoples and the three United Nations mechanisms with specific mandates regarding the rights of indigenous peoples (see A/HRC/30/53, annex, para. 31).

**World Intellectual Property Organization**

39. Member States have undertaken action within WIPO to diminish indigenous peoples' human rights. The drafting and dialogue related to the various texts being discussed within the Intergovernmental Committee of WIPO concerning indigenous rights to intellectual property, genetic resources, traditional knowledge and traditional cultural expressions have been affected. One problematic procedural measure is that indigenous organizations must seek member State approval in order to be accredited to participate in the Intergovernmental Committee. Such a measure contradicts article 18 of the United Nations Declaration.[28] Furthermore, there have been repeated complaints that the established and agreed upon procedural rules of negotiation of an instrument within the WIPO Intergovernmental Committee have not been adhered to by member States.

40. WIPO member States are arguing that they should be "beneficiaries of protection" rather than establishing indigenous-controlled institutions when the proprietors of knowledge are not known. Furthermore, States have pursued broad recognition of the notion of indigenous knowledge being in the "public domain" or "common heritage", thereby denying the status of such information as indigenous knowledge. In addition, States have attempted to remove references to customary law in the context of recognition of harm and benefits, despite the fact that both the

[25] Endorois Welfare Council, Saami Council and International Work Group for Indigenous Affairs, "Joint statement on the continued lack of protection of the rights of indigenous peoples with respect to their cultural heritage in the context of UNESCO's World Heritage Convention", Available from http://www.iwgia.org/iwgia_files_news_files/1234_EMRIP_2015_Statement_of_IGIA_Endorois_elfare_Council_and_Saami_Council.pdf. For the French position, see also United Nations Educational, Scientific and Cultural Organization (UNESCO), "States Parties' comments to the Draft Policy for the integration of a Sustainable Development Perspective into the Processes of the World Heritage Convention". Available from http://whc.unesco.org/en/sessions/20ga/documents/.

[26] World Heritage Committee, decision 39 COM 11, para. 10.

[27] UNESCO, "Report on the achievement of the goal and objectives of the Second International Decade of the World's Indigenous Peoples (2005-2014): Questionnaire Response", February 2014, p. 3. Available from http://www.un.org/esa/socdev/unpfii/documents/2014/unesco.pdf.

[28] WIPO, leaflet No. 12. Available from http://www.ohchr.org/Documents/Publications/GuidelPleaflet12en.pdf.

United Nations Declaration and the Indigenous and Tribal Peoples Convention, 1989, provide for culture and cultural rights to be protected by existing or sui generis indigenous peoples' laws and practices.

41. Unfortunately, States and the corresponding interests of pharmaceutical companies, multinational corporations and others have been primarily focused upon their own interests throughout those discussions. Though some efforts have been made by WIPO to advance indigenous participation, such participation has been limited owing to lack of resources. The Permanent Forum has called upon States, foundations and other organizations to contribute to the WIPO Voluntary Fund for Accredited Indigenous and Local Communities.

42. To date, WIPO has not focused upon establishing a regime that comprehensively responds to the unique status, conditions and rights of indigenous peoples. Rather, WIPO has attempted to fit indigenous peoples into the copyright, patent, trademark, trade and industrial design rules, policies and laws. Such issues should be addressed in full collaboration with indigenous peoples and be informed by the minimum standards of the United Nations Declaration, in order to develop an innovative regime that safeguards their cultural heritage, rights and identity.

43. Indigenous peoples should not be excluded from the existing WIPO regime of intellectual property. A framework that first upholds the minimum human rights standards affirmed by the United Nations Declaration should be complemented by additional measures to safeguard indigenous human rights. Consistent with their right to self-determination, indigenous peoples may choose to engage and use the existing intellectual property rights path. However, distinct standards and rights as well as a regime must first be established to fully address and safeguard the unique status and rights of indigenous peoples.

**Food and Agriculture Organization of the United Nations**

44. FAO engages in progressive positions that are supportive of indigenous peoples' human rights and the United Nations Declaration. The FAO Policy on Indigenous and Tribal Peoples of 2010 highlights:

> FAO activities that affect indigenous peoples will be guided by the human rights-based approach to development, premised on the notion that everyone should live in dignity and attain the highest standards of humanity guaranteed by international human rights law. It will be guided in particular by the core principles expressed in this policy document and by the United Nations Declaration on the Rights of Indigenous Peoples.

However, in negotiating international agreements under procedural rules of FAO, States are able to take positions that fall significantly lower than existing international human rights standards, including those affirmed in the FAO Policy on Indigenous and Tribal Peoples.

45. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of 2012 fail to characterize land and resource tenure rights as human rights (see paras. 3.2 and 4.3), and ambiguously imply that the legal status of the United Nations Declaration may be nothing more than a "voluntary commitment" (see paras. 9.3 and 12.7). The Guidelines also unjustly alter the legal concept of "free, prior and informed

consent" by adding "with due regard for particular positions and understandings of individual States" (see para. 9.9).

46. A central purpose of the Voluntary Guidelines is to improve "responsible governance" in the national context. However, that is unlikely to be achieved in a fair and uplifting manner. There is no overall global framework consistent with human rights that all actors are expected to respect. Although related to governance and food security, indigenous peoples' right of self-determination is not explicitly included in the Guidelines. Instead it is provided that: "These Guidelines should be interpreted and applied in accordance with national legal systems and their institutions" (see para. 2.5). In the crucial context of lands and resources and food security, the Guidelines fail to address respect and protection by States of the right of indigenous peoples to self-government, through their own decision-making institutions.

47. The Voluntary Guidelines weaken States' "international commitments" by introducing the notion of "voluntary commitments". Such a characterization did not exist in the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security of 2004. In commenting on an earlier draft of the Guidelines, the Special Rapporteur on the right to food cautioned that overemphasis on their "voluntary" nature could lead States to "underestimate their obligations" and lead to the undermining of existing standards.[29]

48. Former Special Rapporteur James Anaya underlined in 2013: "Both substantive and procedural complaints have been made concerning the Guidelines. In particular, concern has been raised by a number of indigenous peoples and organizations that certain provisions fall below already agreed upon standards with respect to rights to lands and resources, which are core rights for indigenous peoples." Anaya added:

> The Guidelines could be improved upon by taking more fully into account the special standards and considerations that apply to indigenous peoples. The Special Rapporteur has consistently argued against restrictive interpretations of texts that bear upon human rights, preferring to adopt broad and progressive understandings of written instruments when possible and also to encourage States and other actors always to implement guidelines and policies concerning indigenous peoples in accordance with the spirit and terms of the Declaration [on the Rights of Indigenous Peoples] (see A/67/301, paras. 45 and 47).

**World Bank**

49. Expressing concern regarding a sustained divergence between World Bank practice and the rights of indigenous peoples, in 2013 the Permanent Forum on Indigenous Issues recommended "that the World Bank brings its policy on indigenous peoples (OP 4.10) into full compliance with the United Nations Declaration on the Rights of Indigenous Peoples. The Forum attaches particular

[29] OHCHR, "Comments on the Zero Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests", Olivier De Schutter, United Nations Special Rapporteur on the right to food, 16 May 2011. Available from http://www.srfood.org/images/stories/pdf/otherdocuments/20110516_comments-zero-draft-guidelines_en.pdf.

importance to the need for the Bank to adopt the standard of free, prior and informed consent and, in general, to institutionalize and operationalize an approach based on human rights" (see E/2013/43, para. 56; see also E/C.19/2013/15).

50. As States reaffirmed their commitments to indigenous rights at the World Conference of Indigenous Peoples, the World Bank sought consensus on a proposal to allow Governments to opt out of implementing the indigenous peoples' safeguard policy completely, in favour of an "alternative approach" to the safeguard. The indigenous peoples' safeguard was the only policy in which the World Bank advanced an opt-out clause.

51. The World Bank has made few specific efforts to engage with indigenous peoples on its safeguards policies. That contradicts article 18 of the United Nations Declaration and suggests a bad faith process by both the World Bank and its member States. It is crucial for the World Bank and other development banks to be responsive to Permanent Forum recommendations calling for them to adopt policies that fully conform to the United Nations Declaration and other international human rights standards.

52. In regard to its safeguards policies, the World Bank has been severely criticized by indigenous peoples and many others. For example, in a December 2014 letter to the President of the World Bank from 28 Special Rapporteurs and Independent Experts, it is indicated: "As the Bank seeks to revise and adapt its Safeguards approach to the challenges of the twenty-first century ... it is imperative that the standards should be premised on a recognition of the central importance of respecting and promoting human rights ... Instead, by contemporary standards, the document seems to go out of its way to avoid any meaningful references to human rights and international human rights law, except for passing references".[30]

## IV. Conclusions and recommendations

53. In order to safeguard the rights of indigenous peoples and the international human rights system, it is imperative that procedural rules within international organizations be reformed. That should be undertaken with the full and effective participation of indigenous peoples, in a spirit of partnership and mutual respect consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

54. Some States and international organizations have positive policies relating to indigenous peoples and the United Nations Declaration. Yet when States negotiate new international instruments even within such supportive international organizations, indigenous peoples' status and rights are often adversely affected, and their participation is marginalized.

55. Outdated rules of procedure are inviting unlimited abuses against indigenous peoples. With virtually no checks and balances within such rules, States appear free to propose and agree to discriminatory or other substandard provisions. Such procedural injustices generate substantive injustices.

[30] Special Rapporteur on extreme poverty and human rights and others, Letter to World Bank President Jim Yong Kim, 12 December 2014. Available from http://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf.

56. The practice is generally consensus-driven so that the lowest common denominator prevails. Regardless of the prejudicial consequences for indigenous peoples, other participating States have not formally objected.

57. The international human rights system and rule of law are weakened as a result. It is unconscionable that both the States and international organizations concerned show an ongoing lack of determination and political will to prevent or redress such injustices, as well as safeguard the international human rights system.

58. All such violations of indigenous peoples' rights are incompatible with the obligations of States under the Charter of the United Nations and international human rights law. It is crucial that international organizations use the United Nations Declaration as a standard and framework when indigenous peoples' status and rights may be affected. It is essential that international organizations and their member States fully inform themselves of the distinct nature of indigenous peoples' status and human rights.

59. Specialized agencies and other intergovernmental organizations should reform their procedural rules on an urgent basis, in consultation and cooperation with indigenous peoples. In no case should State proposals on any matter be permitted that would violate the Charter. The rules for such organizations should be fully consistent with articles 41 and 42 of the United Nations Declaration. Special rules should be adopted so that indigenous governments are permitted to participate as governments and not as non-governmental organizations.

60. Within their respective mandates, United Nations treaty bodies and regional human rights bodies have an important role to play in establishing relevant standards and jurisprudence. Similarly, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and Special Rapporteurs and other Independent Experts should play a role. The universal periodic review of the Human Rights Council should also be used to encourage States to comply with their international human rights obligations.

61. The Permanent Forum urges special agencies of the United Nations and other international organizations to include, in their yearly information to the Forum, an update on measures taken to reform their procedural rules consistent with international human rights law.

62. States should refrain from using domestic law or national legislation as a way of circumventing international human rights law and their corresponding obligations. States should not require international human rights standards to be "subject to" or "in accordance with" national legislation. Rather, States, in conjunction with indigenous peoples, should develop legislation at the national level to ensure that domestic laws and policies concerning the rights of indigenous peoples are consistent with the United Nations Declaration.

63. In relation to environment, development, human rights, security and other issues, international cooperation must be wholly inclusive of indigenous peoples and in good faith. As underlined by the International Court of Justice: "One of the basic principles governing the creation and the performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming essential."[31]

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[31] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253.